APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 9, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15513
Non-Argument Calendar

D.C. Docket No. 01-00622-CV-CG-C

JONATHAN SHERMAN WHITSON,

Plaintiff-Appellant,

versus

THE CITY OF GULF SHORES,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

(June 9, 2003)

Before ANDERSON, BLACK and RONEY, Circuit Judges.

PER CURIAM:

Plaintiff Jonathan Sherman Whitson, a twenty year employee for Defendant City of Gulf Shores ("City") terminated in 2001 for unsatisfactory job performance, appeals the district court's grant of summary judgment in favor of the city in this employment discrimination case. In his complaint, Whitson alleged discriminatory violations of the Age Discrimination Employment Act ("ADEA"),

29 U.S.C. §§ 621-34, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a), and a retaliatory discharge for filing an EEOC complaint. Whitson argues on appeal that he produced sufficient direct and/or circumstantial evidence of discrimination and retaliation to raise a genuine issue of material fact to preclude summary judgment. The background facts are clearly stated in the district court's order. After careful review, we affirm based on the well-reasoned order of the district court dated August 30, 2002.

Briefly, whitson proffered no credible direct evidence of discriminatory conduct to any of the claims set forth in his complaint. Assuming Whitson has made a *prima facie* case under *McDonnell Douglas* using circumstantial evidence, he has failed to produce any evidence to rebut the City's asserted legitimate reason for firing Whitson — *i.e.*, poor and substandard work performance over an extended period of time. In other words, there is no record evidence to show that the City's proffered reason for firing Whitson was pretextual and based on a discriminatory reason. This Court has repeatedly held that it will not second guess the business judgment of employers. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, so long as its action is not for a discriminatory reason. *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000). Whitson has failed to produce sufficient evidence for a triable issue as to whether the City fired him for a discriminatory or retaliatory reasons.

The district court's detailed opinion adequately addressed Whitson's ADA claim.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED AUGUST 30, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 01-0622-CG-C

JONATHAN SHERMAN WHITSON,

Plaintiff,

vs.

CITY OF GULF SHORES,

Defendant

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant, City of Gulf Shores, for summary judgment. (Doc. 16). Plaintiff claims that he was discriminated against by his employer in violation of the ADEA, in violation of the ADA and in retaliation for filing an EEOC complaint. The court finds that plaintiff has not produced sufficient evidence under his ADEA claim to show that the defendant's reason for demoting plaintiff or promoting over plaintiff should not be believed or that age was a likely motivator in defendant's decision. The plaintiff has also failed to produce sufficient evidence under his ADA claim from which a jury could find that defendant's proffered reasons for demoting plaintiff or promoting over plaintiff were pretextual. The court further finds that plaintiff has not provided sufficient evidence that defendant failed to provide a reasonable accomodation to

plaintiff under the ADA. Lastly, plaintiff has failed to establish a causal link, under his retaliation claim, between his termination and his filing of an EEOC complaint. Therefore, defendant's motion for summary judgment is due to be granted.

FACTS

In this case, plaintiff claims that he was discriminated against by his employer, the City of Gulf Shores: (1) in violation of the ADEA, (2) in violation of the ADA, and (3) in retaliation for filing an EEOC complaint. The city is governed by a mayor and city council. The mayor has known Whitson since 1981 and is generally familiar with his personnel file. Whitson, who was born on August 14, 1945, began working for the city as a building official in July of 1981 and originally reported directly to the mayor, city council and the city administrator. According to the city, Whitson was not closely managed during that time. As the city grew, Steve Griffin was hired as supervisor and Whitson was given supervisory responsibilities over two building inspectors.

According to plaintiff's brief, Whitson admits that "he made errors;" however, he contends that his employment with the city has been "mostly problem free." Whitson only received two negative evaluations prior to Steve Griffin becoming his supervisor. One of the evaluations rated him negatively for problems in sign code enforcement and the other rated him negatively on demonstrating competence in providing guidance to the general public on code and zoning matters. Whitson admitted at his deposition that he was not being harassed or discriminated against on the basis of age or disability at the time of the above evaluations. During his employment with the city, Whitson continued to receive poor evaluations. Whitson contends that there were several incidents of misunderstanding and has defended his position for each of those misunderstandings.

Appendix B

Steve Griffin noted in his evaluation of Whitson for a period of December 31, 1989, to March 31, 1990, that problems had arisen in Whitson's interpretation of codes and ordinances related to construction within the city jurisdiction. The evaluation also noted that there were several complaints over interpretation of the red clay ordinance that occurred during the rating period. Whitson reportedly concurred with the assessment. At the next rating period, done in December 1990 for the period of April 1, 1990, to October 1990, Steve Griffin again rated Whitson negatively on providing interpretation of codes and ordinances relating to construction with the city jurisdiction. Griffin also rated Whitson negatively on making on-site inspections to insure compliance with approved site and subdivision plans, on assisting the director of community and economic affairs in review of site and subdivision plans, and on the issuance of all trade permits and certificates of occupancy. Griffin also noted that Whitson's site inspections for zoning uniformity were poor. Several other areas were rated negatively including Whitson's job interest and attitude.

In November 1995, Steve Foote replaced Steve Griffin as director of the community development department. Whitson's responsibilities included receiving, reviewing, and rejecting or accepting applications for building permits, interpretation of building code compliance, and determination of whether a building permit should be issued. Whitson stated that during the first year of Foote's tenure as Whitson's supervisor, Foote did not know a lot about the job and let Whitson do whatever he wanted. Whitson does not claim he was discriminated against during that period. In May 1996, Foote gave Whitson the task of reviewing filing procedures and determining what was necessary to modify paper files from a name-based system to an address-based system. Whitson believed that the address system would not be effective and never got around to implementing that indexing system. In August 1996, Foote instructed Whitson

that he needed and expected more from him and told Whitson that he needed to let Foote know what he was working on and inform Foote of any reason for which Whitson left the office. Shortly thereafter, Whitson was reprimanded for publicly criticizing Whitson's subordinate. Whitson admits to publicly criticizing Harris, his subordinate at the time.

On October 15, 1996, Whitson indicated he would be out of work October 15 - 18 on jury duty. However, on October 17, 1996, Whitson learned that he would not be needed for jury duty that day. Whitson admits he did not return to work or inform the city, but stayed home. The following week Whitson indicated on his time sheet that he had been on jury duty on October 17.

On September 17, 1997, the city received a letter from the State of Albama Emergency Management Agency indicating that the city was not in compliance regarding a piece of property known as the Walacavage property, and as a result the city could lose funds or insurance coverage for this matter. Whitson had previously approved the permit for the Walacavage property after Walacavage had gone to Harris, Whitson's subordinate at the time, and Harris had told Walacavage the permit was not proper. Foote repeatedly asked Whitson to take certain actions to remedy the situation and ask Whitson to give Foote an update, but Whitson failed or refused to do so.

Also in October 1997, Foote had a problem with Whitson's training and travel request forms. Whitson had been told after a previous incident that all future trips were to be made according to the approved training request form. Any changes were to first be discussed with Foote. According to Foote, Whitson would turn in travel request forms and then not follow what had been approved in the form. For instance, on October 9, 1997, Whitson was approved for air fare to Myrtle Beach. However, after his travel plan was

approved, Whitson decided to drive. In addition, according to Foote, upon obtaining quotes for the air fare, Foote discovered that Whitson had inflated the air fare price by about $200.

In December 1997, Foote had more problems with Whitson. Whitson spent two days at the courthouse on a matter for which Foote had told Whitson he was not needed. That month Whitson was also sent a written memo requesting that Whitson take certain actions on a matter, yet Whitson never responded or took the requested actions. Foote continued to have problems with Whitson. The defendant submitted, as supporting evidence, numerous copies of memos sent to Whitson and notes from meetings with Whitson to discuss other incidents of Whitson's failure to perform his duties or to follow proper procedures as required by city ordinances or as instructed by his superiors.

Whitson received negative evaluations from Foote beginning with the period from April 1, 1996, to September 30, 1997. This evaluation criticized Whitson in numerous areas of Whitson's job. Whitson was again given a negative evaluation from Foote for the period of September 30, 1997, to June 30, 1999. This evaluation also criticized Whitson's job performance in a number of areas, particularly concerning his poor judgment and negligence in issuing permits and plan review. Whitson's review for the period encompassing June 30, 1999, to September 15, 2000, also detailed continued problems with Whitson's inability or unwillingness to follow supervisor's instructions, his higher than normal absenteeism, his failure to follow directives regarding his whereabouts, his inability to improve or update the building processes and procedures, and his poor judgment and decision making. Whitson continued working in his supervisory position until June 2000 when Josh Harris was promoted above Whitson. At that time, Whitson's position was restructured. After the restructuring, Whitson was directly supervised by the chief

of code enforcement, Josh Harris, and Whitson no longer had the final say on code interpretations.

According to Whitson, in June 2000, at the age of 55, he was demoted. His supervisory and code interpretation functions were given to Mr. Harris. Mr. Harris was approximately 30 years old at the time he was given the supervisory position over Whitson. Prior to his promotion, Harris was Whitson's subordinate. According to Foote, it was necessary for a change in Whitson's position because of Whitson's resistance to Foote's supervision and direction. Foote thought it unwise to allow Whitson to continue supervising other employees or to allow Whitson to make the final decisions on code interpretations and permit issuance. Foote had used counseling, reprimands and probation for Whitson, but still had problems with him. Foote had observed Harris's work and believed Harris would be a good choice for the position. Whitson states that there were other personnel who would have been better for the position because they had more experience, but Harris was a personal favorite of Foote.

After Whitson's job was restructured, Whitson was absent for most of June. On July 19, 2000, Whitson requested Family and Medical Leave, stating that he could not perform the essential functions of his job. Whitson also applied for long-term disability benefits in June 2000 through the city's long-term disability insurance carrier. Whitson represented that he was totally disabled from work. Whitson had made various applications for disability benefits since October 1999. Whitson maintains that he always indicated that he could return to work in the future and that his disability never affected his judgment or his ability to read and understand.

In September 2000, Whitson returned to work with the city because he had used up all his paid leave, was not receiving any long-term disability benefits and needed an

income. On September 14, 2000, Harris placed an inspection assignment in Whitson's basket. Whitson claims he did not learn of the assignment until 3:00 when the contractor called wanting to know why he was not there. According to Harris the assignment had been in Whitson's basket since noon and Whitson was in the office. Whitson claims that because he had a lady coming in for an appointment, he could not do the inspection. Whitson did not do the inspection as scheduled. Whitson also did not perform the inspection first thing the following morning. When Harris confronted Whitson about why he had not done the inspection, Whitson told Harris that he had been busy in the office. Harris completed the inspection himself. According to Harris, the problem was not just that Whitson failed to do the inspection — which was urgent — but that he left the contractors waiting without trying to get word to them, and he did not make alternative arrangements to handle the matter.

On October 18, 2000, Whitson was told in writing to perform a particular inspection. At the bottom of the note it said "RES BY 10.19.00." Whitson claims he did not understand the note. However, Whitson did not ask Harris to explain the assignment, did not respond to Harris in any other way, and did not do the assignment. Harris ended up performing the inspection himself. According to Harris, given Whitson's experience, Whitson should and would have understood the assignment.

On November 13, 2000, Josh Harris requested in writing that the Mayor terminate Whitson. Whitson filed an EEOC charge against the city on October 19, 2000. On November 20, 2000, the city acknowledged receipt of the EEOC charge. Mayor David Bodenhamer, Josh Harris, Steve Foote and the personnel director, Mitch Ferguson, all contend that they had no knowledge that Whitson was going to or had filed an EEOC charge until November 20, 2000. On December 5, 2000, the mayor requested and Harris

provided a more detailed statement of the reasons Harris requested Whitson's termination. The statement detailed Whitson's excessive absences from work often with no accounting for why he was absent, his poor judgment and misapplication of the code, and his insubordination. In February 2001, the mayor held a hearing, at which Whitson was present with counsel. After considering all the facts, the mayor concluded that Whitson should be terminated. The mayor executed a written opinion on the matter which included the following:

> After hearing the statements of Mr. Harris and Mr. Whitson and reviewing the related documents, I have concluded that the several occasions, Mr. Whitson ignored explicit directions from his supervisor regarding important assignments within his job duties (whether these are labeled "insubordination" or "neglect of duty,") they are not tolerable and seriously impair the functions of the Code Enforcement Department. In light of Mr. Whitson's history with the City, I have concluded that no disciplinary step short of dismissal would be effective.

Plaintiff admits that he knows of no evidence of discriminatory animus on the part of the mayor. Whitson appealed the decision of the mayor to the City Council, who later approved the mayor's decision.

Whitson has Meniere's disease, which reportedly affects the inner ear and causes severe hearing impairment in the form of distortion. Meniere's disease also causes Whitson to have attacks of vertigo. Whitson states that humidity, mold and mildew seem to cause head congestion which impacts his hearing. Whitson complained about the humidity at work several years before be was terminated. The city looked into

the matter and could not verify a problem. The city purchased Alpine air purifiers, removed the grass wallpaper that was in Mr. Whitson's office and repainted Whitson's office in an attempt to address his concerns.

Whitson claims that his hearing problem impairs his ability to perform the functions of his position with the city; but did not prevent him from performing them. Whitson's hearing steadily declined over the last ten years of his employment with the city. According to Whitson, he began to suffer from depression because of his hearing problems. Whitson states that his hearing really became a problem during the late 1980's. After that, he used hearing aids, but was constantly seeing a doctor. Whitson had trouble understanding what went on at staff meetings because of his hearing problem. He had difficulty communicating with individuals. Whitson claims that in October 1999, he asked Foote if he could get some help with his hearing, maybe by getting better equipment.

Plaintiff claims that he asked the city for the use of a cell phone to assist him in the performance of essential functions of his job. He contends that cell phones were available to other inspection staff, but that he had to use a walkie talkie which was more difficult for Whitson to hear. The cell phone would also be difficult for Whitson to use since Whitson understands best if he can see the person talking. The mayor, Foote, Harris and Ferguson deny that Whitson ever requested a specific piece of equipment or a specific accommodation.

Whitson asserts that he was constantly being harassed, but does not specify how he was harassed, except that Ferguson twice asked Whitson to have his ears evaluated and to provide Ferguson with a report from the evaluation. Whitson did as requested. The report did not specify particular equipment that Whitson had to have in order to

perform the essential functions of his job. The report mentioned that some items might be helpful, such as a hands-free phone, (which he already had), and a digitate hearing aid which would cost $4,200.00. Whitson already wore a hearing aid. The report also stated that if Whitson had trouble with phone usage, a hearing impaired telephone might be helpful. Ferguson priced the telephone equipment, but shortly thereafter, Whitson left on Family and Medical Leave, claiming that he was totally disabled from work and could not perform the essential functions of his job. A hearing impaired telephone was never ordered.

LEGAL ANALYSIS

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The trial court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-250 (1986). "The mere existence of some evidence to support the non-moving party is not sufficient for denial of summary judgment; there must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002) (quoting *Anderson*, 477 U.S. at 249). "If the evidence is merely colorable, or is not significantly probative, summary judgment maybe granted." *Anderson*, at 249-50. (internal citations omitted).

The basic issue before the Court on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is

so one-sided that one party must prevail as a matter of law." *See Anderson,* 477 U.S. at 251-252. The moving party bears the burden of proving that no genuine issue of material fact exists. *O'Ferrell v. United States,* 253 F.3d 1257, 1265 (11th Cir. 2001). In evaluating the argument of the moving party, the court must view all evidence in the light most favorable to the nonmoving party, and resolve all reasonable doubts about the facts in its favor. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 (11th Cir. 1999). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B&B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1534 (11th Cir. 1992) (citing *Mercantile Bank & Trust v. Fidelity & Deposit Co.,* 750 F.2d 838, 841 (11th Cir. 1985)).

Once the movant satisfies his initial burden under Rule 56(c), the nonmoving party "must make a sufficient showing to establish the existence of each essential element to that party's case, and on which that party will bear the burden of proof at trial." *Howard v. BP Oil Company,* 32 F.M 520, 524 (11th Cir. 1994). Otherwise stated, the nonmovant must "demonstrate that there is indeed a material issue of fact that precludes summary judgment." *See Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991). The nonmoving party "may not rest on the mere allegations or denials of the [non-moving] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e) "A mere 'scintilla' of evidence supporting the [nonmoving] party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir. 1990) (citation omitted). "[T]he nonmoving party may avail itself of all facts and justifiable inferences in the record taken as a whole." *Tipton v. Bergrohr GMBH-Siegen,* 965 F.2d 994, 998 (11th Cir. 1999). "Where the record taken as a whole could not lead a rational trier of fact to find for

the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 at 587 (1986) (internal quotation and citation omitted).

II. Plaintiff's Claims

As noted above, plaintiff claims that he was discriminated against by defendant: (1) in violation of the ADEA, (2) in violation of the ADA, and (3) in retaliation for filing an EEOC complaint. The court will discuss plaintiffs claims in turn below. As an initial matter, the court notes that plaintiff's discrimination claims are time barred if the plaintiff "knew or reasonably should have known of the challenged acts more than 180 days prior to" the filing of a discrimination claim with the EEOC. *Sonnier v. Computer Programs & Systems, Inc.*, 168 F.Supp.2d 1322, 1334-35 (S.D. Ala. 2001) (citations omitted). However, as noted by the plaintiff and as this court stated in *Sonnier*, "where an employee charges an employer with continuously maintaining an illegal employment practice, he may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice." *Id.* (citations and internal quotations omitted). "This continuing violation doctrine provides that a claim, which otherwise would be precluded because it is based on conduct which falls outside of the 180-day filing period, may nonetheless be considered timely if there is a "substantial nexus" between that conduct and conduct occurring within the filing period. *Id.* (citations omitted). However, the court finds that plaintiff has not demonstrated that a discriminatory act transpired within the appropriate time frame.

Appendix B

A. ADEA Claim

Plaintiff alleges that defendant violated the Age Discrimination Employment Act (ADEA), 29 U.S.C. §§ 621-34, by demoting or replacing plaintiff, and/or promoting over plaintiff. He does not allege that his termination was a result of age discrimination. Under the ADEA, it is "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff may prove discrimination by relying on either direct, circumstantial, or statistical evidence. *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995). Direct evidence is evidence which, "if believed, proves the existence of a discriminatory motive 'without inference or presumption'" *Hamilton v. Montgomery County Bd. of Educ.*, 122 F.Supp.2d 1273, 1279 (M.D. Ala. 2000) (quoting *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 641 (11th Cir. 1998)). As the Middle District of Alabama explained:

> Not only must it be evidence of discriminatory 'actions or statements of an employee' but the actions or statements at issue must 'correlat[e] to the discrimination or retaliation complained of by the employee.' Further, the statements 'must be made by a person involved in the challenged decision' and must not be subject to varying reasonable interpretations.

Id. (quoting *Lane v. Ogden Entertainment, Inc.*, 13 F.Supp.2d 1261,1274 (M.D. Ala. 1998)). Plaintiff has not provided any direct evidence of age discrimination. Plaintiff has not presented any direct evidence that any employee or officer of the city discriminated against him on the basis of his age. Evidence that another employee was treated differently does

not prove a discriminatory bias — it merely suggests a discriminatory motive and, as such, is circumstantial evidence. *See Schoenfeld v. Babbitt,* 168 F.3d 1257, 1266 (11th Cir. 1999).

Plaintiff may attempt to show age discrimination based on circumstantial evidence through the application of the *McDonnell Douglas* burden-shifting analysis established by the Supreme Court. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, a plaintiff must first raise an inference of discrimination by establishing a prima facie case. *Chapman v. AI Transport,* 229 F.3d 1012, 1024 (11th Cir. 2000) (citing *Combs v. Plantation Patterns,* 106 F.3d 1519, 1527-28 (11th Cir. 1997)). A plaintiff may do so by showing that he:

(1) was a member of the protected age group,

(2) was subjected to adverse employment action,

(3) was qualified to do the job, and

(4) was replaced by or otherwise lost a position to a younger individual.

Id. (citing *Benson v. Tocco, Inc.,* 113 F.3d 1203, 1207-08 (11th Cir. 1997). If plaintiff establishes a prima facie case, the burden shifts to the defendant; who must then "proffer a legitimate, non-discriminatory reason for the adverse employment action. The employer's burden is exceedingly light." *Hamilton,* 122 F.Supp.2d at 1280 (quoting *Meeks v. Computer Assoc. Int'l,* 15 F.3d 1013, 1021 (11th Cir. 1994) (internal quotations omitted)). If the defendant proffers a legitimate reason for plaintiff's termination, the burden then shifts back to plaintiff, who must show that the employer's proffered reasons are pretextual, or merely a cover for

discrimination. *Id.* "At the pretext stage, in order to survive summary judgment, plaintiff must provide sufficient evidence to allow a reasonable fact finder to conclude, at a minimum, that the proffered reasons were not actually the motivation for the employer's decision." *Miller v. Bed, Bath & Beyond, Inc.*, 185 F.Supp.2d 1253,1270 (N.D. Ala. 2002) (citing *Combs*, 106 F.3d at 1538). Plaintiff may do this by (1) "showing that the employer's legitimate nondiscriminatory reasons should not be believed; or" (2) "showing that, in light of all of the evidence, a discriminatory reason more likely motivated the decision." *Id.* (citations omitted). "This is done by pointing to 'such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons . . . that a reasonable factfinder could find them unworthy of credence.'" *Id.* at 1281 (quoting *Combs*, 106 F.3d at 1539). The ultimate burden of persuasion remains with the plaintiff at all times in cases involving merely circumstantial evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In satisfying the ultimate burden of proving that the adverse employment action was on account of age, a plaintiff need not establish that age was the sole reason for the action but, that it was a determinative factor in the employer's decision. *Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224 (11th Cir. 1982) (citing *Haring v. CPC International, Inc.*, 664 F.2d 1234, 1239-40 (5th Cir.1981)). However, it should be noted that federal courts "do not sit as a superpersonnel department that reexamines an entity's business decisions." *Id.* (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466,1470 (11th Cir. 1991)). It is not appropriate for either the plaintiff or this court to "recast an employer's proffered non-discriminatory reasons or substitute his business judgment for that of the employer." *Id.* (quoting *Chapman*, 229 F.3d at 1030). "An 'employer may fire an employee for a good reason, a bad reason, a reason based on

erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.'" *Nix v. WLCY Radio/ Rahall Communication,* 738 F.2d 1181, 1187 (11th Cir. 1984).

Looking at the facts in the light most favorable to plaintiff, the court will assume for the purpose of this summary judgment motion that plaintiff has established a prima facie case. Plaintiff, at age 55, was clearly a member of the protected age group. There is some issue as to whether there was actually an adverse employment action, but looking at the facts in the light most favorable to plaintiff, the court will assume that he has suffered an adverse employment action. It is highly questionable whether plaintiff was qualified to perform the job he was demoted from or the position Harris was promoted to. As discussed below, the city has submitted credible evidence that plaintiff was demoted or promoted over for legitimate nondiscriminatory reasons concerning plaintiff's job performance. However, the court will presume, *arguendo,* that plaintiff was qualified. Lastly, plaintiff was replaced or promoted over by a younger individual. The burden thus shifts to defendant to proffer a non-discriminatory reason for demoting plaintiff.

According to Foote, it was necessary for a change in Whitson's position because of Whitson's resistance to Foote's supervision and direction. Foote thought it unwise to allow Whitson to continue supervising other employees or to allow Whitson to make the final decisions on code interpretations and permit issuance. Foote had used counseling, reprimands, and probation with Whitson, but still had problems with him. Both before and during the time Foote was plaintiff's supervisor, plaintiff received numerous negative evaluations concerning his job performance. Those evaluations strongly support Foote's decision. Defendant has established a legitimate reason for terminating Whitson. The burden thus shifts back to plaintiff to demonstrate that the employer's proffered reasons are pretextual.

Appendix B

The only evidence produced by plaintiff is that, according to Whitson, he was in fact qualified and that there were other personnel who would have been better for the position than Harris because they had more experience. According to Foote, he had observed Harris' work and believed Harris would be a good choice for the position. Whitson stated that Harris was a personal favorite of Foote. The defendant's proffered reasons are not pretextual simply because they are based on personal or subjective reasons. *See Chapman v. AI Transport,* 229 F.3d 1012, 1033-34 (11th Cir. 2000) ("A subjective reason can constitute a legally sufficient, legitimate, non-discriminatory reason under the *McDonnell Douglas/Burdine* analysis". As stated above, a defendant's reason is legitimate whether it was a good or a bad reason, or for no reason at all, as long as the determinative reason was not plaintiff's age or some other discriminatory reason. Even if the decision was based in part on misunderstandings or criticism which plaintiff reports he has an explanation for, an employment decision is not discriminatory because it was based on a mistaken belief. *Silvera v. Orange County School Bd.,* 244 F.3d 1253, 1261 (11th Cir. 2001). Whitson's claim that he can explain these "misunderstandings" does not address the alleged pretext of the city's rational. It merely attempts to reexamine the city's business decisions.

Plaintiff cites *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000), for the proposition that the plaintiff is entitled to go forward to the jury where there is a colorable issue regarding the falsity of the defendant's proffered reason, regardless of whether there is independent evidence of discriminatory intent. However, this case is distinguishable from *Reeves.* The only evidence Whitson has presented towards pretext is that Whitson has explanations to refute the bases for some of his negative reviews and that many of his alleged errors in judgment involved subjective determinations. Plaintiff has admitted that some of the negative reviews were warranted and has admitted to

committing many of the actions of which his supervisors have complained. As noted above, a subjective reason can constitute a legally sufficient, legitimate, non-discriminatory reason. Plaintiff has not presented sufficient evidence to meet his burden of showing that defendants' reasons were not true or are unworthy of credence. Moreover, there is no evidence that defendants made age-based comments or otherwise expressed some discriminatory animus towards plaintiff that would give rise to an inference that defendant's reasons were a pretext for age discrimination. As this court explained in *Sonnier v. Computer Programs & Systems, Inc.*, 168 F.Supp.2d 1322, 1331-32 (S.D. Ala. 2001):

> In *Reeves,* the defendant was terminated after forty years with his employer. The employer stated that the plaintiff was fired because of failure to maintain accurate attendance and hourly records of employees whom he supervised. *Reeves,* 530 U.S., at 138, 120 S.Ct. 2097. In response, the plaintiff introduced evidence that he had accurately maintained the records of employees whom he supervised, and that his supervisor had demonstrated age-based animus in his dealings with the plaintiff. *Id.* After a verdict in the plaintiff's favor and a reversal by the Fifth Circuit, the Supreme Court granted certiorari. The Supreme Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted [non-discriminatory] justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves,* 530 U.S. at 147, 120 S.Ct. 2097 (emphasis added). The Supreme Court noted that the plaintiff made a "substantial showing that [defendant's] explanation was false" by offering evidence that he had properly maintained the employee attendance records, and that errors in

monthly reports were not attributable to the plaintiff. *Id.*, at 145, 120 S.Ct. 2097.

> Reeves does not stand for the proposition that any evidence of falsity, regarding the reason for termination, combined with a prima facie case is sufficient to withstand summary judgment. *See Hutchinson v. Weiss, Peck and Greer, L.L.C.*, 2000 WL 1836757 (2nd Cir. 2000) (unpublished opinion). Rather, "whether a prima facie case plus an employer's pretextual reason for firing is sufficient to overcome a motion for summary judgment depends on 'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case . . . .'" *Id.* at *2, quoting *Reeves*, 120 S.Ct. at 2109.

Contrary to the facts in *Reeves*, plaintiff has failed to make even a minimal showing that defendant's articulated reasons for his termination were untrue. The court will not substitute its business judgment for that of the employer. Whitson has not produced sufficient evidence to show that the city's reason for demoting plaintiff or promoting over plaintiff should not be believed or that age was a likely motivator in the decision. The city's proffered reasons are not weak, implausible, inconsistent, incoherent, or contradictory such that a reasonable factfinder could find them unworthy of credence.

B. ADA Claim

Under the Americans with Disability Act (ADA) 42 U.S.C. § 12112(a) an employer may not:

> discriminate against a qualified individual with a disability because of the disability of such

> individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

To establish a prima facie case of disability discrimination, plaintiff must demonstrate that he (1) has a disability, (2) is a qualified individual with a disability, and (3) was subjected to unlawful discrimination because of his disability. *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999). Unlawful discrimination may also consist of a failure to provide a reasonable accommodation for a disability if that accommodation would enable the employee to perform an essential function of the job. *Lucas v. WW. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001).

Defendant concedes for the purpose of this summary judgment motion that plaintiff is disabled as defined by the ADA. However, defendant disputes that plaintiff is qualified or that he was subjected to unlawful discrimination because of his disability.

The ADA defines "qualified individual with a disability" as an individual with a disability, who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). As discussed above, defendant maintains that plaintiff was not qualified to perform the essential functions of his employment position, not due to his disability but, due to his resistance to supervision and poor judgment in interpretation. The court finds it doubtful that plaintiff was qualified for the position before it was restructured. However, assuming, *arguendo*, that he has established a genuine issue of fact as to whether plaintiff was qualified for the position at the time he was demoted or promoted over, the court finds that plaintiff has failed to establish that he was subject to unlawful discrimination.

Appendix B

Plaintiff has not established any direct evidence of discrimination based on his disability. In the absence of direct evidence of discrimination a plaintiff may establish a prima facie case of discrimination by using the *McDonnell-Douglas* burden shifting analysis discussed above in reference to plaintiff's ADEA claim. *See Wascura v. City of South Miami,* 257 F.3d 1238, 1242 (11th Cir. 2001) (citing *Hilburn,* 181 F.3d at 1226); *see also Richio v. Miami-Dade County,* 163 F.Supp.2d 1352 (S.D. Fla. 2001). The court will again presume that plaintiff has established a prima facie case. Defendant has admitted that plaintiff is disabled and as discussed above the court will presume, *arguendo,* that plaintiff is qualified[1] and has suffered an adverse employment action. The court further finds that, as discussed above, defendant has established a legitimate reason for demoting plaintiff or promoting over plaintiff. The burden thus shifts back to plaintiff to demonstrate that the employer's proffered reasons are pretextual.

Plaintiff's adverse employment action claim under the ADA fails for the same reason plaintiff's ADEA claim fails. He has not produced sufficient evidence for a jury to find that defendant's proffered reasons should not be believed or that plaintiff's disability was a determinative factor. The only additional evidence of pretext submitted on plaintiff's ADA claim consists of plaintiff's contention that he was harassed by Foote. However, the only evidence of harassment is plaintiff's assertion that he was told to have his hearing tested and to provide Foote with the evaluation. Foote then used the report to evaluate the severity of plaintiff's condition and determine whether any equipment accommodations would be necessary. Such actions do no demonstrate that defendant had a discriminatory intent. The court finds that plaintiff has

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1. As discussed further below, the court is of the opinion that plaintiff has not produced sufficient evidence for a jury to find that he was a "qualified individual" under the ADA.

failed to produce sufficient evidence from which a jury could find that defendant's proffered reasons were pretextual.

Plaintiff next claims that defendant failed to provide reasonable accommodations to plaintiff in violation of the ADA. "An employer unlawfully discriminated against a qualified individual with a disability when the employer fails to provide a 'reasonable accommodation' for the disability unless doing so would impose undue hardship on the employer." *Lucas,* 257 F.3d at 1255 (citing 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a)). Again, the court questions whether plaintiff was a qualified individual. The ADA defined a "qualified individual with a disability" an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8). The "essential functions of a job are those fundamental job duties of an employment position that the individual holds or desires" 29 C.F.R. § 1630.2. The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. 29 C.F.R. § 1630. As is reflected by the legitimate non-discriminatory reasons for the restructuring of plaintiff's position, it was not the plaintiff's disability that rendered him unqualified to carry out his employment position, but rather his resistance to supervision and his poor judgment or negligence in performing his job.

Furthermore, plaintiff has not identified a "reasonable accommodation." An accommodation is "reasonable" only if it enables the employee to perform the essential functions of the job. *Id.* (citing *LaChance v. Duffy's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir.1998)). "The plaintiff bears the burden of identifying an accommodation, and of demonstrating that the accommodation allows him to perform the job's essential functions." *Id.* at 1255-56 (citing *Stewart*

v. Happy Herman's Cheshire Bride, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997); *Willis v. Conopco, Inc.*, 108 F.3d 282, 283 (11th Cir. 1997)). Plaintiff points to the fact that he was not given a cell phone, but admits that the cell phone would not have solved his problems. He would still have had difficulty understanding conversations on the cell phone. Plaintiff also points to the fact that a digital hearing aid would have been helpful. However, the employer's obligation to accommodate does not extend to modifications that are primarily for the personal benefit of the individual in his everyday life. As explained in 29 C.F.R. § 1630.9:

> The obligation to make a reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job related, e.g. specifically assists the individual in performing the duties of particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses.

The court finds that a hearing aid would be primarily for plaintiff's personal benefit and would not qualify as a reasonable accommodation. The only other accommodation identified by plaintiff is a hearing impaired telephone, but plaintiff did not request such an accommodation. Furthermore, defendant began investigating the reasonableness of purchasing a hearing

impaired telephone for plaintiff, but discontinued its efforts when plaintiff took an extended leave of absence. "The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the employee with a disability." *Richio,* 163 F.Supp.2d at 1365 (citing 29 C.F.R. § 1630.2(o)(2)(ii)(3) (2000)). Further, the court notes that "an employer is not required to accommodate an employee in any manner in which that employee desires," *Id.* (citing *Stewart,* 117 F.3d at 1255), and it not required to investigate possible reasonable accommodations if plaintiff cannot identify an accommodation. *Earl v. Mervyns, Inc.,* 207 F.3d 1361, 1367 (11th Cir. 2000). Moreover, as discussed above, none of these accommodations mentioned above would remedy plaintiff's problems with resistance to supervision, poor judgment or negligence in performing his job, or the fact that he was constantly absent from work.

Additionally, the restructuring of plaintiff's job which plaintiff claims was an act of discrimination, could be considered an accommodation. While that accommodation did not appear to remedy the problem, it is further evidence that defendant had no discriminatory intent and attempted to accommodate plaintiff as best it could. Plaintiff was unable to perform the job before the restructuring and defendant attempted to change plaintiff's position to one that plaintiff was capable of performing. Plaintiff's pay was not cut, only his responsibilities. As noted by the *Richio* court, the employer is not required to continue to pay an employee reassigned to a lower grade position the same salary when an accommodation is made. *Richio,* 163 F.Supp.2d at 1366. The fact that defendant did not decrease plaintiff's pay is further evidence that defendant had no discriminatory animus and was attempting to make a reasonable accommodation. *Id.* The court finds that plaintiff has not submitted sufficient evidence for a jury to find that defendant discriminated against plaintiff by failing to make a reasonable accommodation.

Appendix B

C. Retaliatory Discharge Claim.

Plaintiff alleges that the defendant discharged plaintiff in retaliation for filing a complaint with the EEOC. "[T]he same analytical framework applies to retaliation claims as applies to other employment discrimination claims, including the availability of the *McDonnell Douglas* presumption." *Wright v. Southland Corp.*, 187 F.3d 1287, 1305 (11th Cir. 1999) (citing *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993)).

To establish a prima facie case of retaliatory discharge the-plaintiff must show:

> (1) that he engaged in a statutorily protected expression;
>
> (2) he suffered an adverse employment action; and
>
> (3) there was a causal link between the adverse action and his protected expression.

Lucas, 257 F.3d at 1260. (citations omitted). The plaintiff's filing of an EEOC charge is clearly a protected expression and being terminated is certainly an adverse employment action. However, plaintiff has not established a causal link between the two. The decision to terminate plaintiff was made by the mayor. Plaintiff admits that he knows of no evidence of discriminatory animus on the part of the mayor. Harris was plaintiff's supervisor at the time and recommended his termination. However, there is no evidence that Harris even knew that plaintiff had filed an EEOC charge at the time he made the recommendation. The undisputed testimony is that Harris, in fact, did not have knowledge of the EEOC charge at that time. Furthermore, in the Eleventh Circuit, when a biased recommender and the actual decision maker are not

the same person, a plaintiff may not benefit from the inference of causation that would arise from their common identity unless the plaintiff can establish that the decision maker followed the biased recommendation without making an independent investigation. *Stimpson v. City of Tuscaloosa,* 186 F.3d 1328, 1331 (11th Cir. 1999) (citing *Llampallas v. Mini-Circuits, Lab, Inc.,* 163 F.3d 1236, 1248 (11th Cir. 1998). In such a case, the recommender is using the decision maker as a mere "cat's paw" to give effect to the recommender's discriminatory animus. *Id.*

In this case, the mayor had known plaintiff since 1981 and was generally familiar with his personnel file. The mayor held an independent hearing at which Whitson was present. Upon appeal, the city council also approved the decision of the mayor. Plaintiff has not established that the mayor simply followed Harris' recommendation. Harris' recommendation that the mayor terminate plaintiff "does not, itself constitute a change in the terms or conditions of employment absent sufficient causal link between the termination and the discriminatory animus behind the recommendation." *Stimpson,* 186 F.3d at 1331. Furthermore, defendant has established legitimate reasons for terminating plaintiff and plaintiff has failed to produce sufficient evidence that defendant's proffered reasons were pretextual.

CONCLUSION

For the foregoing reasons, the court finds that plaintiff's motion for summary judgement is due to be and is hereby **GRANTED. The Clerk is directed to close this case.**

DONE and ORDERED this 30th day of August, 2002.

s/ Callie V.S. Granade
CALLIE V.S. GRANADE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 12, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-15513-II

JONATHAN SHERMAN WHITSON,

Plaintiff-Appellant,

versus

THE CITY OF GULF SHORES,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

BEFORE: ANDERSON, BLACK and RONEY, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by Jonathan Sherman Whitson is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE